IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

DAVID R. MERRILL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND FREEDOM OF INFORMATION CLEARINGHOUSE

Of Counsel:
JACK C. LANDAU
1750 Pennsylvania Ave., N.W.
Suite 1112
Washington, D.C. 20006
(202) 347-6888

DIANE B. COHN
GIRARDEAU A. SPANN
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for *Amici Curiae*

September 27, 1978

THE CASILLAS PRESS, INC.–1717 K Street N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

DAVID R. MERRILL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary association of newsreporters and editors dedicated to promoting the First Amendment and freedom of information interests of the public in being informed, through its press, about the operations of government. The Freedom of Information Clearinghouse is a non-profit organization which was founded in 1972 to assist members of the public and the press in the effective use of laws granting a right of access to government-held information.

The Reporters Committee and the Clearinghouse submit this brief *amici curiae*, with the written consent of the parties, to urge the Court to affirm the decision below that the Freedom of Information Act ("FOIA") requires the public release of the final policy decisions of the Federal Open Market Committee ("FOMC") immediately upon their adoption by the agency. It is *amici*'s view that this is the only result that would be consistent with the underlying purpose of the FOIA in providing all members of the public an equal right of access to information concerning the working policies and operations of the Executive Branch of government. Of all the activities of the Federal Reserve System, none affects the average citizen more than the decisions of the FOMC, which influence interest rates each month and therefore determine how much the average wage-earner's dollar will be worth. However, under the Federal Open Market Committee's present rule of delaying disclosure of its Domestic Policy Directives and tolerance ranges until after the adoption of superseding directives at its next monthly meeting—and thus until its policy statements are no longer in effect—average citizens and the press which reports to them may only guess at the state of existing monetary policy. At the same time, a small group of influential investment bankers, who act as buying and selling agents for the Federal Reserve, have immediate insights into FOMC's policies and are free to profit from the valuable "inside" information they can discern. The practical effect of FOMC's secrecy policy on the buying and selling of government securities is therefore to disadvantage those members of the financial community and the general public who do not have special access.

Aside from their belief in the importance of disclosure of the information at issue, however, the Reporters Committee and the Clearinghouse are appearing in this case because acceptance of the interpretation of the FOIA urged by the

FOMC is likely to have an adverse impact on the public's right to know that reaches far beyond resolution of the controversy presented here. The FOMC's position ultimately rests on the claim that its statements of policy are exempt from the prompt disclosure requirements of the FOIA because timely release would allegedly impair the efficiency of its operations and therefore be contrary to FOMC's notion of where the "public interest" lies. In our view, the suggestion that any statement of operative policy may be withheld, even if only temporarily, whenever an agency has determined in its discretion that the "public interest" so requires is a notion wholly at odds with the Congressional mandate that all agency records must be promptly disclosed unless "exempt under clearly delineated statutory language," S. Rep. No. 813, 89th Cong., 1st Sess 3 (1965), and is in direct conflict with the prior decisions of this Court.

ARGUMENT

THE LANGUAGE AND LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT, AS INTERPRETED BY THIS COURT, REQUIRE THAT THE DOMESTIC POLICY DIRECTIVES OF THE FEDERAL OPEN MARKET COMMITTEE BE PROMPTLY DISCLOSED.

This case concerns the applicability of the requirements of the Freedom of Information Act, 5 U.S.C.§ 552, to the policy directives issued each month by the Federal Open Market Committee of the Federal Reserve System, which constitute final statements of general monetary policy. Emphasizing that the Freedom of Information Act requires that "the policy statements at issue in this case must be publicly released upon their adoption by the agency unless they fall within a specific FOIA exemption," (App. 18A), the court of appeals examined both the language and the legislative

history of the only exemption upon which petitioner relies, exemption 5, but found no basis upon which to supplant the clear mandate of the statute that such final directives be published immediately after the meeting at which they are adopted. The FOMC, however, now urges this Court to find that the FOIA permits the withholding of "even final and effective decisions where too-prompt disclosure would inhibit the effectiveness of an agency's policy." (Br. at 16). We submit that, as a matter of law, the court of appeals was correct in its conclusion that exemption 5's protections for information ordinarily privileged in the civil discovery context do not encompass the final policy statements at issue here.

As this Court has articulated in prior decisions interpreting the framework and intent of the FOIA, the Act is specifically structured to require that information including "final opinions . . . made in the adjudication of cases," and "statements of policy and interpretations which have been adopted by the agency" be "expressly disclosable under § 552(a)(2) of the Act, pursuant to its purposes to prevent the creation of 'secret law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136-138 (1975). In addition, the Act applies to all other "identifiable records," which must be made available on request, § 552(a)(3), unless they fall within the nine exempt categories specifically enumerated in § 552(b). *Id.* at 137; *EPA v. Mink*, 410 U.S. 73, 79 (1973). As this Court has repeatedly stressed, disclosure is the dominant purpose of the Act and the exemptions are thus to be narrowly construed. *E.g. Department of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976).

In prior decisions, this Court has also examined the purpose and scope of exemption 5, which incorporates the Government's "executive privilege," upon which FOMC so

heavily relies. That privilege protects from civil discovery those advisory opinions which comprise the deliberative processes of government agencies. *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. at 149-150; *EPA v. Mink, supra*, 410 U.S. at 86-87. In *Sears*, the Court concluded that exemption 5, properly construed, permits "the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be," while requiring the "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy." 421 U.S. at 153 (citations omitted). On the basis of both this analysis and the recognition that the requirements in section 552(a)(2) represent "an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law,'" the Court held in *Sears* that exemption 5 could never apply to "final opinions" such as those at issue in that case. *Id.* at 153-154. In addition, the Court concluded that it would be "reluctant" to construe exemption 5 to apply to any of the other documents described in § 552(a)(2), which include "statements of policy" such as the FOMC directives here. *Id. See also Renegotiation Board v. Grumman Aircraft*, 421 U.S. 168, 186-88 (1975).

While it is apparent that the court of appeals properly construed exemption 5 in light of these precedents, FOMC now essentially asks the Court to put its prior rulings aside. The Open Market Committee urges the Court to read into the scope of exemption 5's deliberative process privilege a Congressional intent to vest agencies with the discretion to delay the disclosure of even their final policy statements—in this case, until after those policies are no longer in effect—whenever an agency determines that the FOIA's mandated immediate release would "inhibit the effectiveness

of an agency's policy" (Br. at 16). And if no such Congressional intent can be found in the legislative history as it relates to exemption 5's incorporation of the executive privilege, FOMC alternatively asks the Court to read into exemption 5 a far broader "privilege for official government information whose disclosure would be harmful to the public interest" (Br. at 34). As the court below found, after a careful review, there is nothing in the legislative history of exemption 5 from which such a Congressional intent to permit the withholding of final and effective policy decisions can be inferred.

Most importantly, however, FOMC's argument also runs counter to Congress' express and repeated rejection of any interpretation of the FOIA which would permit agencies unfettered discretion to make disclosure decisions on the basis of vague "public interest" standards. Congress has instead explicitly reserved for itself the role of determining what must be disclosed consistent with a philosophy of the broadest possible disclosure. In *EPA v. Mink, supra,* this Court reviewed the history of the legislation which served as the predecessor to the Freedom of Information Act, and pointed out that Congress had amended the law specifically because the prior statute has been "plagued with vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest.'" 410 U.S. at 79. This Court then pointed out that the FOIA provisions "stand in sharp relief against those of § 3[the former law]," since the nine exemptions in the Act are "explicitly made exclusive," and represent "congressional determination[s]" of the types of information the Executive Branch has the option to withhold. *Id.* at 79-80. It is thus clear that in adopting the FOIA, Congress rejected a broad public interest standard like that which petitioner seeks to now reintroduce into the Act through exemption 5.

FOMC's interpretation in this case is also at odds with Congress' most recent amendment to the Act. In 1976, Congress amended exemption 3 in order to overrule the decision of this Court in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975), which held that the Act should not be interpreted to overrule other statutes which granted unlimited discretion to agencies to withhold information from the public. Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1247. As noted by Mr. Justice Powell, in enacting that amendment, "[c]ongress tightened the standard for Exemption 3 'to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information,' and rejected *Robertson,* which was viewed as 'afford[ing] the FAA Administrator *cart[e] blanche* to withhold any information he pleases . . . .'" *NLRB v. Robbins Tire and Rubber Co.,* ___ U.S. ___, 98 S. Ct. 2311, 2330 (1978) (opinion concurring in part and dissenting in part), *quoting* H.R. Rep. No. 880, 94th Cong., 2d Sess. 23 (1976). *See also American Jewish Congress v. Kreps,* 574 F.2d 624, 628 (D.C. Cir. 1978) (the thrust of the amendment is "to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive Branch.")

Acceptance of the interpretation of the FOIA urged by FOMC in this case would again provide agencies *carte blanche* to keep secret their final decisions and statements of policy whenever an agency determined that disclosure would not promote the efficiency of its operations or otherwise would not be consistent with the "public interest." As the Court concluded below, Congress has the option of enacting a specific statutory exemption or authority for deferral if it should determine that release of FOMC's directives and tolerance ranges would in some way impede the implementation of monetary policy (App. 18A). The

question of what economic consequences would flow from immediate disclosure of the policy directives is one upon which experts disagree, however, with noted economists and even a former Governor of the Federal Reserve System joining *amici* in their view that prompt disclosure of the FOMC's policies would promote, rather than hinder, the public interest. *See* S. Maisel, *Managing The Dollar*, 35-36, 174-175 (1973); *see generally* Hearings on H.R. 9465 and H.R. 9589 before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 204, 225, 270, 279, 299 (1977); *Federal Reserve Policies and Public Disclosure* (Erb, ed.) (American Enterprise Institute, 1978). We submit that, given the history of the FOIA and its amendments, the court below properly recognized that Congress provides the only appropriate forum in which this debate of public policies should be resolved.

Indeed, the Board of Governors of the Federal Reserve has already set this legislative process in motion. On January 25, 1978, legislation was introduced at the Board's request which would provide the specific statutory authority to delay disclosure of the domestic policy directives which the FOMC has asked this Court to create. S. 2427, 95th Cong., 2d Sess., 124 Cong. Rec. S 438 (daily ed. January 25, 1978). However, Senator Proxmire, who introduced the bill at the request of the Board, specifically reserved judgment on the merits of FOMC's contention that immediate release would have adverse effects on the ability of the FOMC to implement national monetary policy. *Id.* Since Congress will thus make an independent determination of whether specific statutory deferral authority is warranted, *amici* respectfully suggest that it is unnecessary to construe existing exemptions to the FOIA more broadly than Congress intended, in order to address the FOMC's concerns.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:

JACK C. LANDAU
1750 Pennsylvania Ave., N.W.
Suite 1112
Washington, D.C. 20006
(202) 347-6888

DIANE B. COHN
GIRARDEAU A. SPANN
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae*

September 27, 1978